Yayasan Buah Pinggang Kebangsaan v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW APPLICATION NO BA-25–78–09 OF 2020
SHAHNAZ SULAIMAN J
22 JANUARY 2025

Revenue Law — Income Tax — Tax-exempt status ('exemption') — Director-General of Inland Revenue ('DGIR') revoked applicant's exemption on finding it had failed to comply with 11 purported conditions attaching to grant of exemption — Whether even if exemption was initially granted without conditions in 1970, DGIR had power under s 148 Income of the Tax Act 1967 to impose conditions as and when he deemed fit — Whether DGIR ought to have communicated imposition of conditions to applicant before finding they had not been complied with — Whether DGIR's failure to communicate imposition of conditions to applicant entitled latter to have revocation of exemption quashed on grounds of unreasonableness and/or illegality in judicial review application

The applicant charitable institution applied for judicial review to quash the respondent's decision ('impugned decision') to revoke its tax-exempt status ('exemption') under s 44(6) of the Income Tax Act 1967 ('the ITA'). The applicant contended that the impugned decision was illegal, void, unlawful and/or ultra vires, irrational and/or unreasonable and denied it of the legitimate expectation of continuing to enjoy the exemption unconditionally. The applicant also sought a declaration that the respondent could not in law impose conditions to the grant of exemption without giving notice of same to the applicant. The applicant contended that when the exemption was first granted to it on 20 June 1970, no conditions were attached. However, the exemption was revoked in late 2019 when the respondent's audit of the applicant discovered that the applicant had not complied with several 'conditions'. The respondent argued that it was empowered under s 148 of the ITA to impose conditions to any approval or direction and to make those conditions effective retrospectively.

Held, granting the judicial review application:

(1) Section 148 of the ITA empowered the respondent to impose or vary conditions attached to the grant of exemption. If there was imposition of new conditions or variation of existing ones, good administration required the respondent to have communicated them to the applicant. The applicant ought to have been given notice of any conditions attaching to the exemption. Finding that the applicant had breached the

conditions when no notice of them had been communicated beforehand was absurd and unjust (see para 48).

(2) In its letter dated 29 August 2019 to the applicant, the respondent had listed 11 instances of non-compliance ('the purported conditions') on the part of the applicant to warrant revocation of the exemption. This showed that the exemption granted to the applicant was not unconditional. If, as claimed by the applicant, no conditions were attached when the exemption was first granted in 1970, then the conditions must have been imposed over the years by the respondent under s 148 of the ITA (see paras 49–51).

(3) The respondent was not able to identify which specific conditions it had communicated to the applicant. Since the applicant did not have prior knowledge of the conditions imposed, the respondent ought not to have taken the purported conditions into consideration in deciding to revoke the exemption. Since the respondent had taken the purported conditions into account in revoking the exemption, the applicant was entitled to have the impugned decision quashed on the grounds of unreasonableness and/or illegality (see paras 55, 57 & 74).

(4) Section 148 of the ITA was sufficient reason to negate any claim by the applicant that it had legitimate expectation to continue to enjoy unconditional tax-exempt status (see para 73).

[Bahasa Malaysia summary

Pemohon yang merupakan pertubuhan kebajikan memohon semakan kehakiman untuk mengenepikan keputusan responden ('keputusan yang dipertikaikan') yang membatalkan status pengecualian cukainya ('pengecualian tersebut') di bawah s 44(6) Akta Cukai Pendapatan 1967 ('ACP'). Pemohon menghujahkan bahawa keputusan yang dipertikaikan adalah menyalahi undang-undang, tidak sah dan/atau ultra vires, tidak rasional dan/atau tidak munasabah dan menafikannya haknya untuk pengecualian tanpa syarat secara munasabah. Pemohon juga memohon pengisytiharan bahawa responden tidak boleh secara undang-undang mengenakan syarat kepada pemberian pengecualian tersebut tanpa memberi notis kepada pemohon. Pemohon berhujah bahawa apabila pengecualian tersebut pertama kali diberikan kepadanya pada 20 Jun 1970, tiada syarat disertakan. Walau bagaimanapun, pengecualian tersebut telah dibatalkan pada akhir 2019 apabila audit responden terhadap pemohon mendapati bahawa pemohon tidak mematuhi beberapa 'syarat' tersebut. Responden menghujahkan bahawa mereka diberi kuasa di bawah s 148 ACP untuk mengenakan syarat kepada sebarang kelulusan atau arahan dan menjadikan syarat-syarat tersebut dilaksanakan secara retrospektif.

Diputuskan, membenarkan permohonan semakan kehakiman:

(1) Seksyen 148 ACP memberi kuasa kepada responden untuk mengenakan atau mengubah syarat yang dilampirkan kepada pemberian pengecualian tersebut. Sekiranya terdapat syarat baru atau perubahan syarat sedia ada, responden sepatutnya memaklumkan pemohon. Pemohon sepatutnya diberi notis tentang sebarang syarat yang dilampirkan kepada pengecualian tersebut. Memutuskan bahawa pemohon telah melanggar syarat apabila tiada notis mengenai perkara tersebut tidak diserahkan terlebih dahulu adalah tidak masuk akal dan tidak adil (lihat perenggan 48).

(2) Dalam suratnya bertarikh 29 Ogos 2019 kepada pemohon, responden telah menyenaraikan 11 tindakan ketidakpatuhan ('syarat-syarat tersebut') yang membolehkan pembatalan pengecualian tersebut. Hal ini menunjukkan bahawa pengecualian yang diberikan kepada pemohon bukanlah tanpa syarat. Sekiranya tiada syarat dilampirkan apabila pengecualian pertama kali diberikan pada tahun 1970 seperti yang dikatakan oleh pemohon, maka syarat-syarat itu sepatutnya telah dikenakan selama bertahun-tahun oleh responden menurut s 148 ACP (lihat perenggan 49–51).

(3) Responden tidak dapat mengenal pasti syarat-syarat khusus yang telah disampaikan kepada pemohon. Oleh kerana pemohon tidak mempunyai pengetahuan awal tentang syarat-syarat yang dikenakan, responden tidak sepatutnya menggunakan syarat-syarat tersebut ketika memutuskan untuk membatalkan pengecualian tersebut. Oleh kerana responden telah menggunakan syarat-syarat tersebut ketika membatalkan pengecualian tersebut, pemohon berhak untuk mengenepikan keputusan yang dipertikaikan atas alasan tidak munasabah dan/atau menyalahi undang-undang (lihat perenggan 55, 57 & 74).

(4) Seksyen 148 ACP adalah alasan yang mencukupi untuk menafikan sebarang tuntutan oleh pemohon bahawa mereka mempunyai jangkaan yang sah untuk terus mendapatkan status pengecualian cukai tanpa syarat (lihat perenggan 73).]

Cases referred to

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal [2018] 2 MLJ 537; [2018] 2 CLJ 513, FC (refd)

Ampat Tin Dredging Ltd v Director General of Inland Revenue [1982] 2 MLJ 46 (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)

Meadows v Minister for Justice, Equality and Law Reform and others [2010] IESC 3, SC (refd)

Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337; [1999] 2 CLJ 471, FC (refd)

A *MRF Ltd, Kottayam v Assistance Commissioner (Assessment) Sales Tax & Ors* (2006) 8 SCC 702 (refd)
Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 2 MLJ 498, CA (refd)
National Land Finance Co-Operative Society Ltd v Director General Of Inland
B *Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339, SC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)
Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang)
C *Sdn Bhd & Ors and another appeal* [2023] 2 MLJ 621; [2023] 2 CLJ 333, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri [2018] 1 MLJ
D 376, CA (distd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442, SC (distd)

E
Legislation referred to

Finance Act 2017 s 8
Income Tax Act 1967 ss 44(6), (6)(a), (7), 82, 145, 148, 148(b), (b)(i), (b)(ii), (b)(iii), Sixth Schedule, para 13
F Interpretation Acts 1948 and 1967 s 18
Rules of Court 2012 O 3 r 2, O 53, O 53 rr 3(2), (6)
Town and Country Planning Act 1976

S Saravana Kumar (with Nur Hanina bt Mohd Azham) (Rosli Dahlan Saravana
G *Partnership) for the appellant.*
Mohd Harris Hanapi (with Mohd Asyraf bin Zakaria) (Senior Revenue Counsel, Inland Revenue Board of Malaysia) for the respondent.

Shahnaz Sulaiman J:

H
INTRODUCTION

[1] The applicant, vide encl 33, applied for judicial review to primarily quash a decision of the respondent, the Director General of Inland Revenue.
I The decision of the respondent is in relation to a letter dated 17 June 2020 which had withdrawn the tax exemption status granted to the applicant under sub-s 44(6) of the Income Tax Act 1967 ('the ITA 1967') and the issuance of notices of assessment for the years of assessment ('YA') 2017 and 2018 dated 22 June 2020 thereafter.

RELIEFS SOUGHT

[2] The main reliefs sought by the applicant are:

(a) an order for certiorari to quash the respondent's decision in the form of a letter dated 17 June 2020 withdrawing the applicant's tax exemption status under s 44(6) of the Income Tax Act 1967 on the grounds that the said decision of the respondent in this respect was illegal, void, unlawful and/or in excess of authority, had been irrational and/or unreasonable, and resulted in a denial of the applicant's legitimate expectations;

(b) a declaration that the respondent is not entitled in law to impose arbitrary and unilateral conditions on a charitable organization such as the applicant when such conditions are not contained in the approval letter and/or communicated to the applicant; and

(c) a declaration that the applicant is a tax-exempt charitable organization pursuant to s 44(6) of the Income Tax Act 1967.

FACTUAL BACKGROUND

[3] The applicant was founded on 2 December 1969. It is a charitable foundation.

[4] The respondent is the Director General of Inland Revenue who has the statutory obligations for the care and of the ITA 1967.

[5] On 8 December 1969, the applicant through the Rotary Club of Petaling Jaya made an application to the Ministry of Finance for all donations made to the applicant to be exempted from income tax. The applicant's aim was to raise public awareness and improve medical care and treatment for those suffering from kidney related disease.

[6] On 20 June 1970, a letter was issued on behalf of the Comptroller General of the Inland Revenue, Malaysia to the applicant, stating that the applicant has been approved for the purposes of para 44(6)(a) of the ITA 1967.

[7] In a letter dated 11 March 2019, the respondent informed the applicant that an audit would be conducted on 8 April 2019. The purpose of this audit was to ensure compliance with the applicant's financial statement made pursuant to the ITA 1967 and other income tax rules.

[8] Pursuant to the audit visit, vide a letter dated 24 May 2019, the respondent informed the applicant of its non-compliance the conditions of approval of tax exemption under sub-s 44(6) of the ITA 1967. On 12 June 2019, the applicant provided the respondent with an explanation pertaining to

A the findings raised by the respondent. A meeting was then held between both parties on 14 June 2019.

[9] On 29 August 2019, the respondent informed the applicant that:

B (a) there was non-compliance on the part of the applicant as follows:

(i) donation receipts were used for the purpose of purchase of assets and are conditional;

(ii) existence and functions of unclear funds;

C (iii) no separation of donation account;

(iv) amendment of constitution without approval;

(v) no prior information and approval to open up dialysis centre and branches (partners);

D (vi) active operation of business (dialysis centre);

(vii) minimal aids on benefit recipients;

(viii) excessive deposition of monies in fixed deposits;

E (ix) learning and training programme being offered to outsiders;

(x) excessive expenditure related to workers; and

(xi) no information of asset sales and purchases.

F (b) the respondent had introduced a 'violation point system' (*sistem mata kesalahan*) to evaluate the violations purportedly committed, and following that assessment, the approval under sub-s 44(6) of the Income Tax Act 1967 of the applicant was revoked;

G (c) the applicant was told that there were plenty restrictions under sub-s 44(6) of the Income Tax Act 1967, and such restrictions will affect part of the operation of the applicant; and

(d) in order for the applicant to continue the applicant's charitable activities, it was suggested that the applicant could apply to establish charitable and educational fund that are in compliance with the intent of approval under sub-s 44(6) of the Income Tax Act 1967.

[10] On 3 September 2019, the applicant requested the revocation not to take effect immediately. The applicant through its tax agent, Deloitte Tax Services Sdn Bhd appealed against the revocation on 24 September 2019. On 25 November 2019, the respondent informed the applicant that the position of the respondent with regard to the revocation remained the same. The applicant then wrote to the then Minister of Finance to further appeal.

[11] Through a letter issued on behalf of the Director General of Inland Revenue dated 17 June 2020, the respondent maintained its position on the revocation.

[12] Aggrieved by the decision of the respondent to withdraw the applicant's tax exemption status under sub-s 44(6) of the ITA 1967, the applicant filed this application for judicial review.

THE PRINCIPLES RELATING TO JUDICIAL REVIEW

[13] Order 53 of the Rules of Court 2012 provides for the procedures for an application for judicial review.

[14] It is trite law that a decision in relation to the exercise of public duty or function may be reviewed on grounds of illegality, irrationality, procedural impropriety or disproportionality.

[15] These grounds were laid down by Lord Diplock in the case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 which was adopted by the Federal Court in the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 as follows:

> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (a) illegality, (b) irrationality, and (c) procedural impropriety. This is how he put it:
>
> > By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exerciseable.
> >
> > By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow and Another* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
> >
> > I have described the third head as 'procedural impropriety' rather than failure to

observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

[16] On the grounds for judicial review, see also the cases of *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 2 CLJ 513 and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147.

[17] Further, in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748, the error of law has been described as follows:

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

[18] Founded on the principles of judicial review, this court will proceed to consider the grounds raised by the applicant in this case.

PRELIMINARY OBJECTION

[19] At the outset, the respondent submitted preliminary objections. These objections are:

(a) the time-bar issue; and

(b) there is no full and frank disclosure on the part of the applicant.

Time-barred

[20] The respondent submitted that this application for judicial review had been filed out of the time frame prescribed under O53 r 3(6) of the Rules of Court 2012.

[21] According to the respondent, the applicant's attempt to quash its decision is not subject to judicial review. The respondent's decision to withdraw

the applicant's tax exemption under sub-s 44(6) of the ITA 1967 was first communicated on 29 August 2019, upheld through a subsequent letter on 25 November 2019, and reaffirmed on 17 June 2020. The latter letter merely reiterated the earlier decisions and informed the applicant that they could reapply for tax exemption status under the same provision.

[22] The respondent contended that the applicant failed to comply with the mandatory time frame for filing a judicial review application as stipulated under O 53 r 3(6) of the Rules of Court 2012.

[23] The learned revenue counsel argued that the calculation of the three months time frame should commence from 17 June 2020 (the date stated on the letter containing the impugned decision) hence should expire on 16 September 2020.

[24] However, this issue had been dealt with by the Court of Appeal where the Court of Appeal found that by the correct interpretation of s 145 of the ITA 1967, O 3 r 2 of the Rules of Court 2012 and the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989), the final date for the applicant to commence this application for judicial review falls on 18 September 2020. The applicant having filed the instant application on 17 September 2020 is therefore within the time frame stipulated.

[25] The Court of Appeal also dismissed the respondent's appeal on the ground that the respondent had, by its own act or conduct, allowed the letter dated 17 June 2020 containing the impugned decision to be the basis for the calculation of the time limited for the applicant to commence this instant judicial review application. This is notwithstanding the fact that the respondent through said 17 June 2020 letter had essentially maintained its earlier decision on 29 August 2019.

[26] Therefore, this court finds this preliminary objection without merit and hereby dismisses this objection.

No full and frank disclosure

[27] The respondent argued that the applicant had failed to include the annexure of the 'notification of approval' which are essentially the conditions for the purpose of exemption under para 13, Sixth Schedule of the ITA 1967, in its affidavit supporting the judicial review application. The said annexure was exhibited by the respondent in its affidavit in reply (see encl 49, exh A11, p 73). This omission constitutes a lack of full and frank disclosure, a requirement in ex parte applications. The respondent cited the Federal Court decision in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ

442, which establishes that a failure to meet this duty of disclosure can lead to the dismissal or setting aside of the leave application.

[28] With respect, this application before this court is for substantive judicial review, and hence, the case of *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 can be distinguished.

[29] In the considered view of this court, the facts or documents, if they indeed were deliberately omitted, may be held against the applicant if they were successfully adduced by the respondent. However, it is not for this court to dismiss the application for judicial review summarily. For this reason, this objection too must fail.

ANALYSIS

[30] The main issue before this court is whether the decision of the respondent in withdrawing the tax exemption status of the applicant given under sub-s 44(6) of the ITA 1967 is correct and is an accordance with the provisions of the law as stipulated under the ITA 1967.

[31] From the statement pursuant to O 53 r 3(2) of the Rules of Court 2012 that the grounds where the grievance of the applicant are founded are:

(a) the respondent failed to consider sub-s 44(6) of the ITA 1967 read with para 13 of Schedule 6 of the ITA 1967 in light with *National Land Finance Co-Operative Society Ltd v Director General Of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339 and *Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri* [2018] 1 MLJ 376;

(b) the respondent is not entitled to unilaterally and arbitrarily impose conditions on the exemption obtained by the applicant in 20 June 1970;

(c) the conditions imposed by the respondent are not prescribed by law;

(d) the applicant enjoyed a vested rights pursuant to *National Land Finance* and *Society of La Salle Brothers*;

(e) the taxing statute must be read strictly, and if there is any doubt it must be resolved in taxpayer's favour;

(f) the respondent has acted arbitrarily and exceeded its authority, and has disregarded the decisions of the superior courts; and

(g) in arriving the impugned decision the respondent had failed to ask itself whether it has any legal and constitutional authority, such that no reasonable person having asking himself the right questions and having taken into consideration the relevant matters would not have arrived at such conclusion.

[32] This court will now proceed to consider this application for judicial review.

Condition imposed on the said exemption

[33] It was submitted on behalf of the applicant that when the said exemption was first granted vide a letter dated 20 June 1970 issued on behalf of the Comptroller of the Inland Revenue, Malaysia. No conditions had been imposed by the respondent. It was further argued that it is not open to the respondent to arbitrarily and unilaterally impose new conditions, and flowing therefrom, the conditions are not prescribed by law and were never communicated to the applicant.

[34] As alluded earlier, the exemption was granted pursuant to sub-s 44(6) of the ITA 1967. The contents of the letter dated 20 June 1970 are reproduced below:

Tuan,

National Kidney Foundation of Malaysia

Further to my letter of the 20th May, I have pleasure in advising that the above Foundation has been approved for purposes of Section 44 (6)(a) of the Income Tax Act, 1967 with effect from 8th December, 1969. All cash donations to the Foundation would therefore qualify for income tax relief to the donors as from that date.

2. The Notification of Approval will be published in the Federal Government Gazette shortly.

[35] Based on the above excerpt, it is noted that the Comptroller of Inland Revenue, Malaysia had made reference to para 44(6)(a) of the ITA 1967 in granting the exemption. Paragraph 44(6)(a) of the ITA 1967 was an old provision. It refers to the maximum deductible amount from the aggregate income of the person other than a company, for the purpose of the said sub-s 44(6) of the ITA 1967. The provision has since been amended such that there is no longer distinction between an individual and a company in terms of maximum deductible amount.

[36] In this regard, sub-s 44(6) of the ITA 1967 reads:

> 44 Total Income
>
> ...
>
> (6) Subject to subsection (12), there shall be deducted pursuant to this subsection from the aggregate income of a person for the relevant year reduced by any deduction falling to be made for that year in accordance with subsection (1) an amount equal to any gift of money made by him in the basis year for that year to the Government, a State Government, a local authority or an institution or

A organisation or a fund approved for the purposes of this section by the Director General on the application of the institution or organisation concerned:

Provided that the amount to be deducted from the aggregate income for the relevant year in respect of any gift of money made to any institution, organization or fund approved for the purposes of this section by the Director General shall not exceed
B ten per cent of the aggregate income of that person in the relevant year.

[37] It is observed that reference to the word 'fund' in the current sub-s 44(6) of the ITA 1967 is a new creature by virtue of s 8 of the Finance Act 2017 (Act 785) which came into effect from the year of assessment 2017. The
C phrases 'fund', 'institution' and 'organization' were defined in sub-s 44(7) of the ITA 1967. The common trait between all three phrases is that the fund must not be established or held; or that the institution or organisation must not be operated or conducted, primarily for profit.

D

[38] It was submitted on behalf of the respondent that the respondent is empowered to impose conditions, even if the conditions were to operate retrospectively, by virtue of s 148 of the ITA 1967. For ease for reference, s 148 of the ITA 1967 is reproduced below:

E 148 Provisions as to approvals and directions given by Minister or Director General

Where by or under this Act there is conferred on the Minister or the Director General power to give an approval or direction of any kind (not being a power exercisable by statutory order) —

F (a) an approval or direction given in the exercise of that power shall not be regarded as subsidiary legislation;

(b) that power shall be deemed to include —

(i) power to give any such approval or direction with retrospective effect;

G (ii) power to vary or revoke any such approval or direction retrospectively or otherwise;

(iii) power to give any such approval or direction subject to such conditions as the Minister or the Director General, as the case may be, may think
H fit to impose; and

(c) any such approval or direction shall take effect when it is given or, where the Minister or Director General as the case may be specifies a date on which it is to take effect, on that date.

I **[39]** In construing the effect of the sections above, reference could be made to the case of *Ampat Tin Dredging Ltd v Director General of Inland Revenue* [1982] 2 MLJ 46 where Mohamed Azmi J had found that principles in English cases could be relied on, on certain conditions:

Although the English cases cited by learned counsel for the appellant company are based on s 137(a) of the English Income Tax Act 1952 — which is not in pari materia with our provision — the principles enunciated therein are indeed of great value to this court, provided they have some bearing upon the case under consideration and any difference in the statutory provisions must be given due consideration before they are applied.

[40] The approach of the court in only adopting strict literal approach in interpreting tax statutes have been widen through the Federal Court in the case of *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97. Gopal Sri Ram JCA had the occasion to state:

[78] In my judgment s 17A has no impact upon the well established guidelines applied by courts from time immemorial when interpreting a taxing statute. Section 17A and these guidelines co-exist harmoniously for they operate in entirely different spheres when aiding a court in the exercise of its interpretive jurisdiction. The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739:

> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.
>
> Secondly, '... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'. (Per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Company Ltd v R Selection Trust Ltd v Devitt (Inspector of Taxes)* [1945] 2 All ER 499; [1946] AC 119).
>
> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. *If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.*
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

[79] In my respectful view, s 17A of the Interpretation Acts 1948 and 1967 neatly fits into and is complementary with the third principle in the judgment of Lord Donovan. Hence, the governing principle is this. When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not

A expressly set out therein. Imposing a tax by means of subsidiary legislation on a person not identified in the parent Act produces an absurd and unjust result and therefore does not promote its purpose or object. (Emphasis added.)

B **[41]** Based on the foregoing authority, the court in interpreting tax statutes are not bound by the literal words of the Act itself but may also look into the purpose of such Act in order to avoid injustice or absurdity (see: *Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 2 MLJ 498).

C **[42]** The exemption was granted pursuant to sub-s 44(6) of the ITA 1967, and the requirement to be eligible under sub-s 44(6) of the ITA 1967 is that one must get the approval of the Director General of Inland Revenue. There is nothing in the sub-s 44(6) to suggest that the discretion by the Director General of Inland Revenue under sub-s 44(6) must or can only be exercised by statutory order.

D

[43] In exercising his discretion under sub-s 44(6) of the ITA 1967, s 148 of the ITA 1967 similarly grant the Director General the power stipulated under sub-s (b) of the s 148.

E

[44] Based on s 148 of the ITA 1967, this court is of the considered view there is no ambiguity as to the power available to the Director General of Inland Revenue in relation to the grant of the exemption. The exemption was granted pursuant to sub-s 44(6) of the ITA 1967, and the requirement to be eligible under sub-s 44(6) of the ITA 1967 is that one must get the approval of the Director General of Inland Revenue. There is nothing in the sub-s 44(6) to suggest that the discretion by the Director General of Inland Revenue under sub-s 44(6) must or can only be exercised by statutory order (one example where a statutory order is required is s 82 of the ITA 1967).

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G

[45] In exercising his discretion under sub-s 44(6) of the ITA 1967, sub-s 148 of the ITA 1967 similarly grant the Director General the power stipulated under sub-s (b) of the s 148.

H **[46]** The proper construction of para 148(b)(ii) of the ITA 1967 which grants the Director General 'the power to vary or revoke any such approval' would necessary mean the power to vary approval granted, from one which is unconditional to the one which is conditional; and similarly the Director General too have the power to vary approval which have only one condition to

I one which have two or more conditions. The word 'vary' too connotes that para 148(b) of the ITA 1967 covers the situation where there is a license or approval in place, the power to vary such license or approval.

[47] It is also to be noted that the (i), (ii) and (iii) are to be read conjunctively

due to the existence of the word 'and' in sub-s 148(b) of the ITA 1967. Therefore, it is the considered view of this court that the power remains with the respondent to impose or add conditions to the exemption.

[48] Nonetheless, while under s 148 of the ITA 1967 grants the respondent power to impose or vary conditions over the exemption, should there be any variation of condition or imposition of new conditions over the said exemption, good administration requires the respondent to convey or communicate any such conditions to the applicant. The applicant, in the view of this court, ought to have been given notice of any change in conditions. This is to enable the applicant to comply and fulfil the conditions imposed by the respondent. The failure of the respondent in informing the applicant of the new or varied conditions prior to the conditions coming into effect, would, in the view of this court, produce an 'absurd and unjust' result when the applicant fails to comply with the new conditions.

[49] In a letter dated 29 August 2019, the respondent decided to withdraw the tax exemption based on the issues as reproduced below:

(i) Resit derma digunakan untuk pembelian aset dan bersyarat

(ii) Kewujudan & fungsi dana-dana yang tidak jelas

(iii) Tiada pengasingan akaun — derma

(v) Pindaan perlembagaan tanpa mendapat kebenaran

(vi) Tiada makluman awal untuk pembukaan pusat dialysis & pembukaan cawangan (rakan kongsi)

(vi) Menjalankan peprniagaan secara aktif (pusat dialysis)

(vii) Penerima manfaat: bantuan minimal

(viii) Kemasukan duit yang banyak didalam 'Fixed deposit'

(ix) Program pembelajaran & Latihan — ditawarkan kepada orang luar

(x) Manfaat -Belanja berkaitan pekerja yang sangat tinggi

(xi) Tiada pemakluman pembelian & pelupusan asset

[50] The above implies that the exemption granted to the applicant is not unconditional, and due to the applicant's breach of the conditions, the applicant's exemption status was revoked. It further implied that item (i) to item (xi) from the excerpt above are the conditions for the said exemption. For convenience, item (i) to item (xi) shall be referred to as 'the purported conditions'.

[51] Before this court, as alluded earlier, it is the position of the applicant that when the exemption was first granted in the 1970s, no condition was

imposed by the respondent. If that is the case, then the conditions imposed, as could be seen from item (i) to item (xi) of the excerpt above, must have been imposed throughout the years by the respondent under s 148 of the ITA 1967.

[52] The questions that now are, when were the purported conditions imposed by the respondent? At the time of imposition, were the purported conditions conveyed to the applicant?

[53] The respondent took the position that the applicant had been informed of the conditions imposed and was therefore aware of the purported conditions. In the course of submission, the learned revenue counsel relied on three letters, each dated 20 June 1970, 25 July 1970 and 12 November 1990 respectively.

[54] In the letter dated 20 June 1970, the respondent informed the applicant that their application for exemption under para 44(6)(a) of the ITA 1967 had been approved. However, the respondent did not specify any particular condition imposed on the applicant as part of the approval for the exemption.

[55] The second and third letters referenced conditions for exemption under para 13, Sixth Schedule of the ITA 1967. The revenue counsel argued that since the applicant did not challenge these conditions when they were implemented, they are now barred from doing so. However, it was noted that the revenue counsel only cited the letters generally and did not identify which specific conditions, allegedly breached by the applicant, were mentioned in the three letters.

[56] In deciding that the exemption be revoked, the respondent relied on the 'violation point system' to evaluate the extent of the applicant's breach of the purported conditions. The question is whether this 'violation pint system' made known to the applicant.

[57] Without the applicant having knowledge of the conditions imposed for it to maintain its exemption status under sub-s 44(6) of the ITA 1967, the respondent ought not to take those purported conditions into consideration in determining if the exemption should be revoked. By taking into account matters which the respondent ought not to take into account, the impugned decision warrants the intervention of this court (see: *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337; [1999] 2 CLJ 471).

[58] The respondent had attempted to rely on a guideline issued in year 2005 to strengthen the respondent's case. The 2005 guideline was entitled 'Garis Panduan Bagi Permohonan Untuk Kelulusan di Bawah subseksyen

44(6), Akta Cukai Pendapatan 1967'. As the title suggests, the guideline is for the reference of those who intended but has yet to obtain exemption under sub-s 44(6) of the ITA 1967. The applicant who had been granted the exemption status cannot be expected to be bound by it. In any event, the guideline is merely issued for the purpose of reference and could not have the force of law binding upon the applicant.

[59] In the present judicial review application, the applicant's primary allegation is that the respondent's decision in the form of a letter dated 17 June 2020 withdrawing the applicant's tax exemption status under sub-s 44(6) of the Income Tax Act 1967 was illegal, void, unlawful and/or in excess of authority, had been irrational and/or unreasonable, and resulted in a denial of the applicant's legitimate expectations.

[60] The respondent, based on these issues and using the 'point system', decided to revoke the tax exemption pursuant to sub-s 44(6) of the ITA 1967. How did the respondent determine the points assigned for the violations, some of which are labelled as 40, 45 or 50?

[61] As stated in exh A24, p 173 of encl 49, *lampiran* A, para 1, the applicant must carry out activities that provide services and benefits to all Malaysians, regardless of race, religion, and ethnicity, in accordance with its establishment objectives, while continuously adhering to the current requirements and new conditions set by the respondent. The issue here is whether the newly imposed 'point system' was communicated to the applicant before implementing it upon the applicant.

[62] The respondent wrongly found that the applicant had violated the 'point system' regarding its tax exemption status. It must be highlighted that the condition the applicant purportedly violated was not initially imposed by the respondent in 1970, and that condition was never communicated to the applicant, nor was it *gazetted* or issued in any public rulings (guidance) by the respondent. In this regard, this court finds that the facts and circumstances presented to establish illegality due to unlawful treatment.

[63] While s 148 ITA 1967 provides the respondent with retrospective power, the respondent failed to consider the principle of reasonableness. See *Meadows v Minister for Justice, Equality and Law Reform and others* [2010] IESC 3 when a decision maker makes a decision which affects rights then, or reviewing the reasonableness of the decision the rights of the person must be impaired as little as possible.

Gazettement

[64] It is not disputed that the exemption was *gazetted* vide *Gazette* No 14, Jil 14, No 2899 dated 2 July 1970. Does this then elevate the status of the said exemption to the status of subsidiary legislation, such that s 148 of the ITA 1967 does not apply.

[65] In this regard, reference could be made to s 18 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) which reads:

> 18 Gazette
>
> (1) The Gazette shall be published in parts as follows:
>
> ...
>
> (e) required to be published in the Gazette *or* which the Government deems it necessary to publish for general information other than matter which this subsection requires to be published in the other parts.

[66] For a *Gazette* to be elevated to the status of a subsidiary legislation, it must first be a requirement of the law for it to be *gazetted*. In the case of *Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal* [2023] 2 MLJ 621; [2023] 2 CLJ 333 the Federal Court stated:

> [127] To comprehend our contention fully, it is noteworthy that His Lordship Edgar Joseph FCJ adopted the approach taken by the Scottish Outer House in *Simpson v Edinburgh Corporation* [1960] SC 313. Yet, a careful reading of the Scottish equivalent of the TCPA, the Town and Country Planning (Scotland) Act 1947, which was applicable in *Simpson*, demonstrates that there are material differences between the two statutes which warrant different treatment as to their effect. *Under the Scottish legislation, and unlike the TCPA, there is no requirement for the statutory development plan to be gazetted.* Section 9 of the Town and Country Planning (Scotland) Act 1947 only provides that the local authority 'shall publish in such manner as may be prescribed by regulations under this Act a notice stating that the plan has been approved, made, or amended'. It is also pertinent to note that there is no equivalent in the Scottish legislation to the TCPA's provision that planning permission shall not be granted where it contravenes the development plan. This is pursuant to s 22(4)(a) read together with s 20 of the TCPA. It is clear that under the TCPA, once a development plan is approved and in force it has the effect of invalidating planning permission where such permission was granted contrary to the plan. This is not the position under the Scottish legislation. For these reasons, His Lordship's dicta in *Sungai Gelugor* does not accurately reflect the legal status and effect of the structure plan under the TCPA.
>
> [128] In line with interpreting the TCPA holistically and in order to give effect to its object and purpose as intended by Parliament, the statutory force of development plans under the TCPA requires 'slavish compliance'. Such compliance with the development plans would advance the cornerstone of the TCPA of ensuring public participation which in practice means publication and transparency of the relevant policies upon which development is permitted and, so, allowing for members of the

public to object and make representations to such policies. Issuing or relying on secret, unpublished guidelines to make decisions on granting or rejecting planning permission would be antithetical to the TCPA and its object.

[129] It is important to clarify the delineation between law and policy vis a vis the structure plan. Pursuant to s 8(3) of the TCPA, the structure plan is a written statement that formulates, inter alia, the policy and general proposals in respect of the development and use of land in a State. The formulation of these policies and proposals requires the exercise of judgment concerning planning considerations. However, once the draft structure plan has been gazetted, the structure plan and its provisions attain statutory force. *Its statutory force stems from not merely its gazettement, but also its source and the requirement of compliance in the approval process.* The source of the structure plan, or its starting point is a statutory provision requiring the State Director to prepare a draft structure plan. This is unlike normal policy documents, the drafting of which is within the discretion of the relevant public authority. Further, s 22(4) of the TCPA provides that where the approval of planning permission contravenes any provision of the development plan, this would have the effect of invalidating that approval. It is thus evident that the structure plan has legal status and legal effects under the TCPA, and that it is not a mere statement of policy that has no legally binding force. (Emphasis added.)

[67] In the foregoing case, the Federal Court had made distinction between the Scottish law and the Town and Country Planning Act 1976, where it was observed that the development plan need not be slavishly complied with, unlike the Town and Country Planning Act 1976, not only for reason that the Scottish law need not require *gazettement*, but for the fact that the *gazettement* stems from a source of law require it to be done.

[68] Applying the above case to the instant application, it is the considered view of this court that the mere fact that the said exemption was *gazetted* does not mean that it attained the statutory force, but rather, since the said exemption was not required by law to be *gazetted*, it merely serve the purpose of notice to public.

Vested right

[69] The applicant claimed that it has a vested right in the said exemption, citing *Society of La Salle*. However, if one is to peruse the case cited, one major difference is that the society had its right accrued from the Income Tax Ordinance 1947, and there is indeed no provision stipulated in the ITA 1967 that such rights vested be revoked under the ITA 1967.

[70] Unlike the present case, the said exemption was obtained under sub-s 44(6) of the ITA 1967, and at that time, s 148 was in force. Therefore, the case of *Society of La Salle* could be distinguished from the applicant's case.

Legitimate expectation

[71] The applicant submitted that there is a legitimate expectation for the applicant to continue enjoying the said exemption. The case cited by the applicant in the context of tax cases is *MRF Ltd, Kottayam v Assistance Commissioner (Assessment) Sales Tax & Ors* (2006) 8 SCC 702.

[72] The case of *MRF Ltd (supra)* could be distinguishable to the instant case. In that case, the writ petitioner had relied on the promise of the Government for tax exemption, and therefore expended a huge amount of money, such that the Government had enjoyed the benefit from the investment. It is in such context that the court applied the principle of legitimate expectation for the writ petitioner to enjoy the exemption.

[73] The factual matrix of *MRF Ltd* indicates that the principle in that case does not apply to the instant application. The existence of s 148 of the ITA 1967 negates any sort of expectation that the applicant will continue to enjoy unconditional exemption status.

CONCLUSION

[74] In the upshot, this court is satisfied that there is unreasonableness and/or illegality to warrant this court to allow this application for judicial review.

[75] This court orders an order for certiorari to quash the respondent's decision in the form of a letter dated 17 June 2020 withdrawing the applicant's tax exemption status under sub-s 44(6) of the Income Tax Act 1967.

[76] No order as to costs.

Application for judicial review allowed.

Reported by Ashok Kumar